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IN THE

# Supreme Court of the United States

October Term, 1965

No. ~~1957~~ 175

MARK J. GERRY, INC., d/b/a DOVE MANUFACTURING COMPANY,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Mark J. Gerry, Inc., doing business as Dove Manufacturing Company, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the decree, except as modified by its Decision made and entered on January 5, 1966, enforcing an Order of the National Labor Relations Board, hereinafter called the "Board", dated January 30, 1965, under Section 10 of National Labor Relations Act as amended.

## Opinion Below.

The Findings of Fact, Conclusions of Law of the Board are reported. 145 N.L.R.B. 1379 No. 128 issued January 4, 1964.

The Opinion of the United States Court of Appeals for the Ninth Circuit from which Petitioner petitions for a Writ of Certiorari has not yet been reported. The Opinion of the Court of Appeals appears in the certified record filed herein with the Clerk of this Court, and is printed in the Appendix "A" annexed to this brief in support of this Petition.

## Jurisdiction.

The decision of the United States Court of Appeals was rendered on January 5, 1966. Rehearing was sought and denied on March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519; 29 U.S.C., Sec. 151, *et seq.*)

## Questions Presented for Review.

1. Did the National Labor Relations Board commit error in its conclusion that Petitioner discriminated against Ozie Perkins by discharging her and thus violated Section 8(a)(3) of the Act;

2. Did the National Labor Relations Board exceed its jurisdiction in violation of Title 29, U.S.C. Section 160(c)(1) in ordering petitioner to offer Ozie Perkins reinstatement and to compensate her for any loss of pay and post appropriate notices, who was discharged for cause under the terms of a collective bargaining agreement?

3. Whether or not the findings of the Board are supported by substantial evidence on the record considered as a whole, as required by the National Labor Relations Act as amended?

## Statutory Provision Involved.

The following statutory provisions are involved:

Title 29, U.S.C. Section 160(c)

No Order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Title 29, U.S.C. Sections 160(e) and (f)

The findings of the Board with respect to questions of fact if supported by substantial evidence of the record considered as a whole shall be conclusive.

## Statement of the Case.

The Board's Complaint in this case alleged in paragraph 9 that Petitioner discharged and refused and continues to fail and refuse to reinstate Perkins for the reason that Perkins did not join or assist the Group but joined and assisted the Union, or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Complaint was based upon a charge filed by the International Ladies' Garment Union AFL-CIO by Sam Swartz.

At the time of Ozie Perkins' discharge there was a collective bargaining contract in full force and effect between the Employees Group Union and Petitioner,

which had been entered into on September 30, 1960, and provided in Paragraph 12 that work commenced at 8:00 A.M., and in Paragraph 17, among other things, that employees shall be discharged only for good cause, such as lateness, absenteeism, insubordination and violation of rules and neglect of duty [R. 34; Tr. 85 G.C. Ex. 2].*

The extent of Ozie Perkins' purported union activities were limited to being an observer for the AFL-CIO at an election conducted by the National Labor Relations Board [R. 291] and seen by management talking to a union organizer after the election [R. 130-131].

The undisputed evidence was that Ozie Perkins was habitually late, violated every rule of employment by not notifying Petitioner of her absence and lateness. She knew other operators were dependent on her production. Her lateness affected production [R. 312-313, 323-334, 385]. Even though warned as early as March 1962 that work commenced at 8:00 A.M. [R. 330] and again on October 2, 1962 [R. 311], she continued to be late and take a day off without notifying Petitioner [R. 187-188]. On October 26, 1962 Petitioner discharged Ozie Perkins because her lateness and absenteeism affected other operators as it made them wait for her production [R. 312]. Her time card showed that between May 5th and October 20, 1962 she was absent 10 days, 14 hours and 59 minutes [Resp. Ex. 3; R. 336].

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*"R" refers to Reporter's Transcript; "Tr." refers to portions of Stenographic Transcript; References designated: G.C. "Ex.", or Resp. "Ex." are exhibits of the General Counsel and Respondent, respectively, in unfair labor practice hearing.

After hearing the Board through its Trial Examiner found that Ozie Perkins was not discharged because of her long condoned tardiness or absenteeism, not for her alleged insubordination, although there was not any other evidence offered, except the two specific instances of purported union activity, and that the alleged causes for Perkins' discharge were pretexts and that Perkins was discharged because she was a leading adherent of the Union among the employees, and for that reason management sought to be rid of her.

After issuance of the Board's Order on January 30, 1964, the Board petitioned the Court of Appeals for the Ninth Circuit for enforcement. On January 5, 1966 the Court issued its decision enforcing the Board's Order, except it ruled that the Board's Order exceeded its jurisdiction in so far as it purports to suspend the operation of the existing collective bargaining agreement until and unless the Employees' Group Union wins the representation election and finds the collective bargaining agreement valid. However, it did not pass upon Paragraph 17 thereof, which provides for the discharge of an employee for good and sufficient reason as set forth therein; nor did it take into consideration Section 160 (c) of Section 29 U.S.C., which prohibits the Board from requiring reinstatement of any individual if such individual was suspended or discharged for good cause.

## Reasons for Granting the Writ.

The questions decided by the Court below and presented in the instant Petition are important issues of Federal Law, which are in conflict with the decisions of its own Circuit, other Courts of Appeals and this Court on the same matter, and should be settled by this Court.

The Board's Order is contrary to law in that the Board has not met the burden of proof required of it, and is based on the Trial Examiner's findings which are not supported by substantial evidence as a whole on the record but on inferences which are not the result of a judicial process or reasoning. It is beyond the jurisdiction and authority of the Board to order reinstatement, and is not based upon or justified by the Board's own findings of fact or its own conclusions of law, denying the Petitioner due process of law, freedom of contract in violation of the Fifth Amendment to the Constitution. The Board's decision strains to arrive at a finding that Ozie Perkins was discriminately discharged. It fails to explain Petitioner's defense and discredits without adequate explanation Petitioner's reason for discharge. The Trial Examiner did not consider Petitioner's action justified despite the uncontradicted evidence to the contrary and rejected the claim of Petitioner's right to discharge a disobedient employee who violated every rule of employment by being absent and irresponsible. It is clear that the Trial Examiner's finding is based on an inference not supported by any facts in the record.

The mere fact that the Board says that there was discrimination does not make it so; the Board's determination cannot be sustained without the support of substantial evidence.

In *N.L.R.B. v. United Brass Works, Inc.*, 287 F. 2d 689, 693. (4th Cir. 1961), it was held that if discrimination may be inferred from mere participation in union membership activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership.

The Ninth Circuit has consistently held since 1943, commencing with *N.L.R.B. v. Citizens-News Co.*, 134 F. 2d 970, 974:

> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities. There must be more than this to constitute substantial evidence."

The Second, Fourth, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits all subscribe to the same proposition.

*Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874, 878-79 (8th Cir. 1965);

*N.L.R.B. v. Ace Comb Company*, 342 F. 2d 841, 847 (8th Cir. 1965);

*N.L.R.B. v. Threads, Inc.*, 308 F. 2d 1, 13 (4th Cir. 1962);

*Metal Processors' Union Local No. 16 AFL-CIO v. N.L.R.B.*, 337 F. 2d 114, 117 (D.C. Cir. 1964);

*N.L.R.B. v. Stafford*, 206 F. 2d 19, 23 (8th Cir. 1953);

*Ohio Asso. Tel. Co. v. N.L.R.B.*, 192 F. 2d 664, 666 (6th Cir. 1951);

*N.L.R.B. v. Florida Steel Corp.*, 308 F. 2d 931, 935 (5th Cir. 1962);

*N.L.R.B. v. McGahey*, 233 F. 2d 406, 412-413 (5th Cir. 1956);

*N.L.R.B. v. Wagner Iron Works, etc.*, 220 F. 2d 128, 133 (7th Cir. 1955);

*Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F. 2d 423, 426-427 (7th Cir. 1962).

The facts herein are comparable to those in *N.L.R.B. v. Covington Motors,* 344 F. 2d 136, 138 (4th Cir. 1965) where the employee was absent twelve Mondays and enforcement was denied.

In arriving at his decision the Trial Examiner concentrated on one element of proof and failed to explain the overwhelming evidence of Petitioner's lack of motive for the alleged discriminatory discharge.

Therefore, the Board's Order in the instant case can be enforced only if Petitioner's basic right to discharge Ozie Perkins was rendered illegal by a motive prescribed by the Act. The crucial factor resolves itself around the issue of motive.

The decision of the Lower Court failed to review the entire record in accordance with the established principle of law that an employer may discharge an employee of good cause or bad cause or no cause at all, unless the real motivating purpose is to do that which Section 8(a)(3) forbids, which proposition the Court below reiterated in the recent case of *Lozano Enterprises v. N.L.R.B.,* Number 20069, decided March 3, 1966, approving the language in *N.L.R.B. v. McGahey,* 233 F. 2d 406, 413 (5th Cir. 1956).

This Court expressly recognized in *N.L.R.B. v. Jones and Loughlin Steel Co.,* 301 U.S. 1, 45-46, that:

> "The Act does not interfere with the normal right of the employer to select its employees or discharge."

See:

*N.L.R.B. v. Rockaway News Supply Co.,* 345 U.S. 71.

Discharge of an employee for wrongful conduct is an inherent power of management protected by law.

The National Labor Relations Act as Amended 29 U.S.C.A. Sec. 158(a)(1) and (3) does not entitle an employee to engage in unauthorized conduct that is disruptive of harmonious labor relations between employer and employee or among employees.

*N.L.R.B. v. Soft Water Laundry, Inc.*, 346 F. 2d 930, 934 (5th Cir. 1965).

If an employee is both inefficient and is engaged in union activities that is a coincidence that does not destroy the just cause for his discharge.

See:

*N.L.R.B. v. Birmingham Pub. Co.*, 262 F. 2d 2, 9 (5th Cir. 1959).

This Court has held in *N.L.R.B. v. Insurance Agents Int. Union*, 361 U.S. 477 that a discharge of the kind involved in this case motivated by good faith violates no specific provision of the Act.

It would appear under the Board's theory in the instant case that irrespective of an employee's breach of a collective bargaining agreement and disregard of reasonable rules of work he cannot be discharged and is entitled to the protection of the Act, if he expresses an interest in joining a rival union.

By its decision the Board tells Petitioner that Ozie Perkins' insignificant purported union activities give her special protection against a discharge for cause, even though provided for in a valid collective bargaining agreement and by Sec. 160(c) of Title 29 U.S.C. The Trial Examiner held that the valid collective bargaining agreement be suspended until an election be held,

thereby failing to give consideration that Perkins breached the terms of said agreement.

From all of the above it is clear that the Board engaged in practices which the Amendments to the Act were designated to eliminate.

The Act contemplates the making of contracts with labor organizations, and is the manifest objective in providing for collective bargaining under Section 7 of the Act.

The record shows an unwillingness to comply with the terms of the collective bargaining contract and a desire to unilaterally impose her own terms and conditions of employment while remaining at work.

The discharge of Ozie Perkins was for cause justified by existing contractual arrangements between the Employees Group Union and Petitioner.

The Court below in upholding the order of reinstatement of Ozie Perkins negates the terms of the contract.

The decision thus affects virtually every employee who is bound under rules of work and a labor contract and is important in the administration of the Act because knowledge that the Circuit Court has ruled the Petitioner powerless to defend a discharge for cause will spread with its undesirable social effect.

The Court below, after review of the evidence, concluded that there was substantial evidence to support the order of reinstatement but failed to consider the right of the Petitioner to discharge for cause under the collective bargaining agreement, although the record beyond doubt shows legitimate management reasons for the discharge. Had it applied the correct standard of review, under Sections 160(e) and (f) of Title 29 U.S.C.

it would have refused enforcement of the Board's Order.

Under the Act there must be substantial evidence that the discharge was for union activity and where the employer has justification to terminate an employment the Circuit Courts have held that the Board cannot impute an ulterior motive to the employer from the synchronism without more of the finding on the employees' union advocacy.

*Wellington Mills West Point Mfg. Co. v. N.L.R.B.*, 330 F. 2d 579, 587 (4th Cir. 1964);

*N.L.R.B. v. Thread, Inc.*, 308 F. 2d 1, 11-13 (4th Cir. 1962).

The Lower Court disregarded the rule of law established by the decisions of its own Circuit and the Supreme Court that there must be substantial evidence:

(1) to show that the employee was discharged because it knew that the employee was engaged in protective activity;

(2) to show that the employee was discharged because it engaged in protective activity;

(3) to show that the discharge had the effect of encouraging or discouraging membership in a labor organization.

The Courts must refuse to enforce orders based on findings which do not meet this standard.

*N.L.R.B. v. Kaizer Aluminum & Chemical Corp.* 217 F. 2d 366, 368-369 (9th Cir. 1954);

*N.L.R.B. v. Isis Plumbing & Heating Co.*, 322 F. 2d 913, 919-922 (9th Cir. 1963);

*N.L.R.B. v. Electric Workers*, 346 U.S. 464, 473;

*Universal Camera v. N.L.R.B.*, 340 U.S. 474, 487-490 (1951);

*N.L.R.B. v. Latex Industries, Inc.*, 307 F. 2d 737, 739 (6th Cir. 1962);

*N.L.R.B. v. Rockaway News Co.*; 345 U.S. 71;

*N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 461 (2nd Cir. 1958).

It is manifestly clear that Perkins' conduct was individual and not collective or concerted. There was no evidence that the Petitioner had knowledge of any concerted union activity on the part of Perkins, which is a vital element in the proof of a violation of Section 8(a)(3) of the Act.

*N.L.R.B. v. Atlanta Coca-Cola Bottling Co.*, 293 F. 2d 300, 308-310 (5th Cir. 1961).

Accordingly, when Petitioner discharged Perkins for lawful reasons, not associated with anti-union considerations, her discharge could not be characterized as interference with a restraint or coercion of the exercise of the right absolutely protected by the National Labor Relations Act.

These insignificant acts of Ozie Perkins do not support a finding of substantial evidence considered as a whole as required by the Act and cannot be considered as engaging in a concerted activity for mutual aid and protection and, therefore, the discharge could not have interfered with, restrained, or coerced her in the statutory protective right to engage in certain concerted activities.

Even if Perkins' activity may probably be considered concerted, it is not the type of concerted activity which absolutely privileges the Act against reasonable discipline by the employer.

## Conclusion.

It is submitted that the Board's findings are not supported by substantial evidence on the record as a whole as required by the Act. Accordingly, the Court below erred in enforcing the Board's Order of reinstating Ozie Perkins.

Because the question of employer's right to discharge for cause is of manifest importance in the administration of the Act and because the holding conflicts in principle with the decisions of this Court, the issue should be authoritatively resolved.

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari to review the Decree of enforcement of the United States Court of Appeals for the Ninth Circuit, in the above matter, should be granted.

Respectfully submitted,

BERNARD B. LAVEN,
*Attorney for Petitioner.*

## APPENDIX "A".

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Mark J. Gerry, Inc., d/b/a Dove Manufacturing Company, Respondent. No. 19,561.

Received Jan. 6, 1966.

[January 5, 1966]

On Petition to Enforce an Order of the National Labor Relations Board.

Before: Barnes and Koelsch, Circuit Judges, and Powell, District Judge.

Koelsch, Circuit Judge.

This is a petition by the National Labor Relations Board for an order of this court enforcing an order of the Board issued against Mark J. Dove, Inc. on January 30, 1964.

In mid-September, 1960, upon winning an election, the Employees' Group Union was duly certified by the Board as exclusive bargaining representative of respondent's production and maintenance employees. Under date of September 30, it entered into a collective bargaining agreement with respondent. The agreement was for two years, with a provision for automatic annual renewals unless terminated by a sixty day notice prior to the expiration of the current term.

The Los Angeles Dress and Sportswear Joint Board, a subsidiary of the International Ladies' Garment Workers' Union, which had been defeated at the election

in 1960, renewed its organizing efforts in 1962 and on July 19 of that year filed with the N.L.R.B. a petition for the determination and certification of bargaining representative pursuant to Section 9 of the Act. (29 U.S.C.A. § 159). The Board, concluding that a question of representation had arisen and that the contract was not a bar [*In re Mill B, Inc.*, 40 N.L.R.B. 346 (1942)], caused an election to be held on October 2, 1962. Neither labor organization received a majority of the valid votes and the Board directed a run-off. However, the Dress Union filed objections to the conduct of the election and later several unfair labor practice upon which complaints were issued.

The Board consolidated for hearing the unfair labor cases with the representation case (objection to election) and on January 30, 1964 issued the order which it now petitions this court to enforce. The Board (by its adoption of the Trial Examiner's intermediate report) found in substance that during the two week period preceding the election the employer had committed certain unfair labor practices in affording the use of its facilities to the Employers' Group, in making statements both written and oral to its employees that were calculated to influence them to vote for the Employers' Group as their representative, and in actively obstructing the Dress Union in campaigning. The Board also found that afterwards, while the matter of representation remained subject to the run-off election, the employer engaged in similar conduct and, in addition, discharged Ozie Perkins, one of its production employees, because of her activities on behalf of the Dress Union. Accordingly, the Board directed a new election and ordered the respondent to discontinue such practices and not

recognize the Employers' Group or give effect to the existing contract "unless and until said organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Respondent's employees at its Los Angeles, California, plant." Further, the Board ordered respondent to offer the discharged employee reinstatement, to compensate her for any loss of pay and to post appropriate notices.

Initially respondent urges that the Board should not have consolidated the cases but should have heard them separately. The unfair labor practice charges bore a fair relationship to each other and to the matter at issue in the representation case. The question of whether respondent's actions were calculated to influence the employees' selection of a bargaining representative was common to all of them. "[T]here is no intrinsic evil in such a consolidated hearing . . ." [*N.L.R.B. v. La-Salle Steel Co.*, 178 F. 2d 829, 832 (7th Cir. 1949)] and no prejudice to the respondent resulting therefrom is apparent to us.

The respondent's main contention is that the findings of fact are not supported by substantial evidence. Upon a thorough consideration of the entire record, we are persuaded otherwise. The evidence, viewed in a light most favorable to the prevailing party, clearly shows the employer actively supported one of two rival organizations that were vieing for certification as the employees' bargaining representative. Its acts, whether well intentioned or otherwise, abridged rights guaranteed respondents' employees under the Act and constituted unfair labor practices.

The next question concerns the validity of the Board's order so far as it purports to suspend the operation of the existing bargaining agreement until and unless the Employees' Group wins the representation election.[1]

The Board calls attention to the following cases in which orders containing the same or similar provisions were approved and enforced:

*International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731 (1961);

*L. Ronney & Sons Furniture Mfg. Co.*, 93 N.L.R.B. 1049, enforced 206 F. 2d 730 (9th Cir. 1953);

*Signal Oil & Gas Co.*, 131 N.L.R.B. 1427, enforced 303 F. 2d 785 (5th Cir. 1962);

*Summers Fertilizer Corp.*, 117 N.L.R.B. 245, enforced 251 F. 2d 514 (1st Cir. 1958), and

*St. Louis Independent Packing Co.*, 129 N.L.R.B. 622, enforced 291 F. 2d 700 (7th Cir. 1961).

In each of them the contract or the dealings between employer and union against which the order was directed constituted an unfair labor practice. For example, in *Garment Workers'* the order suspended an agreement

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[1]We disagree with counsel that the matter may not now be considered because respondent failed to object when the case was still before the Board. The question is one of whether the Board acted in excess of its jurisdiction and hence can be asserted initially in an enforcement proceeding for, as the Supreme Court said, "Since the Court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." N.L.R.B. v. Cheney California Lumber Co., 327 U.S. 385, 388 (1946).

Moreover, the matter was called to the Board's attention. The record reveals that respondent duly excepted to the order on the ground that "the Labor Board does not have jurisdiction to cancel or modify vested rights of a binding valid contract of the employees."

entered into at a time when the union did not represent a majority of the employees in the unit. The Court declared that the agreement reflected violations of the employees' rights, guaranteed by Section 7 of the Act, "to bargain collectively through representatives of their own choosing" or "to refrain from" such bargaining. It pointed out that by so recognizing the union, the employer interfered with the employees' Section 7 rights and gave support to a labor organization in violation of Section 8(a)(1) and 8(a)(2) of the Act; and that the union, by mistakenly assuming to represent the bargaining unit, was guilty of restraining and coercing the employees in the free exercise of those rights. [Sec. 8(b)(1)(A)]. For these reasons, said the Court, the "unlawful genesis of this agreement precludes its partial validity."

In *L. Ronney & Sons, supra,* 93 N.L.R.B. 1049, the employer's illegal assistance to the prevailing union immediately before the representation election cast serious doubt upon the status of that union as bargaining representative, and upon the validity of the ensuing collective bargaining agreement. This was also true in *Signal Oil & Gas Co., supra,* 131 N.L.R.B. 1427. The Fifth Circuit observed, in granting enforcement of the order [303 F. 2d 785, 787]:

> "Execution of a contract with a union does constitute support of it, since 'once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.' N.L.R.B. v. Pennsylvania Greyhound Lines, 1938, 303 U.S. 261, 268, 58 S. Ct. 571, 82 L.ed. 831. Employers who have entered a collective bargaining agree-

> ment with a union when a real question as to representation existed have been held responsible for committing an unfair labor practice. (Citations omitted)."

However, in this case, unlike those relied upon by the Board, the validity of the collective bargaining agreement was not in issue and there was no basis in the evidence for a finding of its invalidity. On the contrary, it appeared that the agreement was consummated nearly two years before the inception of any unfair labor practices, and at a time when the Employers' Group was manifestly the duly authorized and designate representative of the employee bargaining unit.[2] This distinction is critical. In *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197 (1938), the Court explained the source, nature and limits of the Board's corrective powers. It declared that:

> ". . . the Act gives no express authority to the Board to invalidate contracts with independent organizations. That authority, if it exists, must rest upon the provisions of Sec. 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act.' "[3]

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[2]During the hearing, the Trial Examiner, in reply to an inquiry, declared "I am not too concerned about contracts or the right of contract and so forth, but there is no allegation in the complaint that this contract in any way was not the product of a free union or free employer."

[3]By subsequent amendment to the decision in Consolidated Edison, the word "subchapter" was substituted for "Act." However, this did not change the import of the sentence.

But, continued the Court,

> "[t]he power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

The Court concluded that the Board had exceeded its jurisdiction, because there was "no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective." These principles, applicable to this case, dictate a like conclusion.

Lastly, respondent urges that the Trial Examiner denied it a fair hearing and, in particular, that he was biased and unduly limited respondent's cross-examination of several witnesses. The charge of bias was predicated upon statements made by the Examiner during the course of the hearing. However, the most that appears is that, on several occasions following an objection, he engaged in a colloquy with counsel concerning the ruling. None of the statements nor anything about them suggests he entertained a feeling of hostility or ill will toward respondent. It is true that, on several instances, the Trial Examiner too narrowly circumscribed respondent's cross-examination of a witness. But although er-

ror, the rulings could not be deemed so prejudicial as to constitute a denial or procedural due process, for they simply prevented inquiries into matters that were collateral to the main issue.

The order of the Board is modified so as to eliminate the directions as they appear therein which require respondent not to give effect to the agreement with the Employers' Group and to post notices containing such a recital. As modified, the order will be enforced.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 175

MARK J. GERRY, INC., d/b/a DOVE MANUFACTURING COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 355 F. 2d 727. The decision and order of the Board (R. 52-54, 66)[1] are reported at 145 NLRB 1379.

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[1] "R." refers to the volume of pleadings and "Tr." to the transcript, both of which were filed in the court of appeals.

## JURISDICTION

The decision of the court of appeals was entered on January 5, 1966 (Pet. App. 1). Petitions for rehearing were denied on March 14, 1966, and the court's judgment was entered on April 25, 1966. The petition for a writ of certiorari was filed May 26, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged an employee for union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

## STATEMENT

Petitioner is engaged in the manufacture of women's clothing in Los Angeles, California (R. 33; 5, 8). In September 1960, a labor organization known as the "Employees' Group" was certified as collective bargaining representative for petitioner's production and maintenance employees, and it executed a collective bargaining agreement with petitioner (Pet. App. 1, R. 34; Tr. 85). The collective bargaining agreement had a term of two years and was subject to automatic renewal from year to year thereafter (Pet. App. 1, R. 34). For approximately the next two years, the Employees' Group held no meetings, collected no dues, elected no officers, adopted no constitution or bylaws, and processed no grievances (R.

36; Tr. 87, 88-91). On July 19, 1962, the Union[2] filed a petition to represent the employees in the unit and, on September 6, 1962, the Board directed a representation election (Pet. App. 1-2, R. 34).

Beginning in September 1962, petitioner permitted the Employees' Group to hold meetings in the plant lunchroom, at lunch and after hours; provided loudspeaker and posting facilities for the announcement of these meetings; sent supervisors to attend and participate in the meetings; allowed posters for the Employees' Group to be put up in the lunchroom; promulgated campaign literature attributing employee benefits to the contract with the Employees' Group and attached such literature to the employees' paychecks (Pet. App. 2, 3, R. 36-37, 39-41). When the Union requested posting and meeting facilities comparable to those granted the Employees' Group, petitioner denied the request (Pet. App. 2, 3, R. 41-42).

On October 2, 1962, the day of the representation election, employee Ozie Perkins talked to other employees during the lunch hour, urging them to vote and sign cards for the Union (Tr. 129-130). Perkins served as the employee observer for the Union at the election and attended a meeting with management as one of the Union's representatives just before the election (R. 43; Tr. 131). Neither the Employees' Group nor the Union received a majority of

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[2] The Los Angeles Dress & Sportswear Joint Board, a subordinate body of the International Ladies' Garment Workers' Union, AFL-CIO, and Local 986, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

the votes cast; a runoff election was accordingly directed (R. 35).

In the three weeks following the election, petitioner reprimanded Perkins for being 10 or 15 minutes late one morning and for being absent without calling in one day when her son was sick (R. 44-46; Tr. 135, 138-140, 310, 380-381, 383-384, 391). On October 26, petitioner's production manager passed within two or three feet of Perkins as she was talking to a Union organizer in front of the plant during the lunch period (R. 44; Tr. 131). That afternoon, the manager called Perkins to his office and discharged her, allegedly for tardiness and absenteeism (Pet. App. 2, 3, R. 44, 45; Tr. 130, 132, 313).

Perkins had worked for petitioner almost ten years at the time of her discharge and was admittedly one of its "best operators" (R. 43; Tr. 127, 324). Like other employees in her section, Perkins had long followed irregular hours of employment, coming to work late several times a week and taking an occasional day off without notice (R. 44; Tr. 134, 326-327). Since the employees were paid on a piece rate, for work actually performed, petitioner had accepted this practice for many years (Tr. 385-386, 389-390).[3]

On these facts, the Board found that petitioner had violated Section 8(a)(2) and (1) of the Act by

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[3] Early in 1962, when Perkins represented the girls in her department in requesting a wage increase because they were making only $8 or $9 a day, petitioner's production manager told her: "You girls have a good thing here. You walk in when you get ready * * * walk out when you get ready * * * [and] take off when you get ready" (Tr. 145-146).

contributing unlawful assistance and support to the Employees' Group while denying comparable benefits to the Union, and that it had violated Section 8(a)(3) and (1) by discharging Ozie Perkins for her activities in support of the Union (R. 47-50, 66). The Board's order directed petitioner to cease and desist from the unfair labor practices found; to withhold recognition and cease maintaining a collective bargaining agreement with the Employees' Group unless it was certified as the employees' bargaining representative following a Board-conducted election; to reinstate employee Ozie Perkins with back pay; and to post appropriate notices (Pet. App. 2-3, R. 52-53, 66). The court of appeals determined that substantial evidence supported the Board's findings and enforced the order except for the provisions requiring petitioner to cease maintaining a collective bargaining agreement with the Employees' Group (Pet. App. 3, 4-7, 8).[4]

## ARGUMENT

The only question presented by the petition is whether substantial evidence supports the Board's finding that petitioner, in violation of Section 8(a)(3) and (1) of the Act, discharged employee Ozie Perkins because of her union activities. The holding

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[4] The court refused to enforce this portion of the Board's order because "it appeared that the agreement was consummated nearly two years before the inception of any unfair labor practices and at a time when the Employers' [*sic*] Group was manifestly the duly authorized and designate[d] representative of the employee bargaining unit" (Pet. App. 6).

of the court below that the Board's findings are so supported (Pet. App. 3) does not warrant review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. In any event, the facts summarized in our Statement, pp. 3-4, *supra*, make it clear that the Board was fully justified in concluding (R. 44-46) that petitioner discharged Perkins because of her union activities and not for tardiness or absenteeism.

Petitioner's contention (Pet. 2, 5, 9) that Section 10(c) of the Act, which provides that the Board shall not order reinstatement or back pay for any individual "suspended or discharged for cause," bars the Board from ordering Perkins' reinstatement with back pay raises again the question whether substantial evidence supports the Board's finding that Perkins was discharged for union activities rather than "for cause." Similarly, the fact that the collective bargaining agreement with the Employees' Group authorized Perkins' discharge "for good and sufficient reason" (Pet. 5, 9-10) is irrelevant in light of the Board's finding, supported by substantial evidence, that Perkins was discharged for union activities. And, insofar as petitioner may be contending that its contract with the Employees' Group could authorize the discharge of employees for engaging in rival union activities or that it could deprive the Board of jurisdiction to remedy such discharges, its contention is plainly unsound.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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